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No. 05-1120

In The
Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* STATE OF DELAWARE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the EPA erred when it decided that it lacks authority to regulate Greenhouse Gas emissions from non-point automobile sources under Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1)?

2. Whether the EPA arbitrarily and capriciously refused to regulate Greenhouse Gases under Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1)?

3. Whether Delaware has a particular interest in the prompt federal regulation of Greenhouse Gases?

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INTEREST OF THE *AMICUS CURIAE*

The State of Delaware is greatly concerned about the impact of global warming on its citizens. As a low-lying coastal state, Delaware experiences daily the effects of global warming. These effects include increased flooding and coastal erosion, increased ocean temperature, and heightened damage to the environment, the property and the people of Delaware.

The Clean Air Act (CAA) provides Delaware with little flexibility in limiting the impact of Greenhouse Gases from motor vehicle emissions. California is the only state granted authority to set emission standards for automobiles. 42 U.S.C. § 7543(a). While Delaware could adopt, pursuant to 42 U.S.C. § 7507, the more stringent standards promulgated by California, the standards would only apply to motor vehicles registered in Delaware. Data indicate that Delaware lacks actual ability to enforce such a regulation over a large portion of the automobiles driving within and traveling through the State, as they are registered in and regulated by sister states. EPA should fulfill its statutory obligation to enforce the provisions of the Clean Air Act in a manner that is protective of the environment of all the states and territories.

AUTHORITY FOR FILING A BRIEF OF *AMICUS CURIAE*

Authority to file this brief is provided under Supreme Court Rule 37.4, which provides in pertinent part that "no motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of ... a State, Commonwealth,

Territory, or Possession when submitted by its Attorney General." Sup. Ct. R. 37.4.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 415 F.3d 50 (D.C. Cir. 2005). The Court of Appeals' order denying Petitioners' motion for rehearing *en banc* is reported at 433 F.3d 66 (D.C. Cir. 2005).

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 2005. The Court of Appeals' order denying the petition for rehearing and rehearing *en banc* was entered on December 2, 2005. Jurisdiction in this Court is proper under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1251(b)(2) as an action between the United States and one or more of the several states. Jurisdiction in the Court of Appeals for the District of Columbia was proper under § 307(b)(1) of Clean Air Act, 42 U.S.C. § 7607(b)(1), which grants exclusive authority over "nationally applicable regulations promulgated, or final actions taken, by the Administrator." Denial of a petition is a final agency action for purposes of § 307(b)(1).[1]

[1] *See, e.g., American Forest & Paper Ass'n v. EPA*, 294 F.3d 113 (D.C. Cir. 2002); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990).

STATEMENT

In October 1999, the International Center for Technology Assessment (ICTA), along with other concerned organizations, petitioned EPA requesting the agency to promulgate rules that would regulate Greenhouse Gas emissions – emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs) – from new motor vehicles. ITCA claimed that EPA had the duty to regulate Greenhouse Gases based on the statutory authority contained in § 202(a)(1) of the Clean Air Act which provides that the "Administrator shall prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). ICTA noted that EPA had already determined CO_2 to be an air pollutant in a 1998 memorandum authored by the then-General Counsel to EPA, and that the various sections of the CAA create a statutory duty for EPA to regulate Greenhouse Gas emissions from new motor vehicles.

Following a notice and comment period and after reviewing the comments, EPA denied the petition in September 2003. *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922-23 (Sept. 8, 2003) [hereinafter CENHVE]. As the basis for denial, EPA asserted that its review of the legislative history and other Congressional enactments led it to conclude that "the CAA does not authorize regulation to address global climate change,"[2] and that if statutory authority does exist to allow

[2] EPA contends that Congress was well aware of global climate change at the time of the last comprehensive amendments to the CAA

(Continued on following page)

regulation of Greenhouse Gases under the CAA, EPA would in any event decline to regulate due to policy considerations. The policy considerations included scientific uncertainty, President Bush's comprehensive global climate change policy, and the potential foreign policy implications of regulating Greenhouse Gases. *Id.* at 52925. In denying the petition, EPA did not follow its statutory duty to prescribe standards to regulate pollutants that "may reasonably be anticipated to endanger public health or welfare."

On a petition for review of EPA's decision, the United States Court of Appeals for the D.C. Circuit delivered a divided opinion which sidestepped the issues of whether Petitioners have standing and whether EPA has the ability to regulate Greenhouse Gas emissions under the CAA. *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50, 56 (2005). Writing for the Court, Judge Randolph assumed *arguendo* these two issues before finding that EPA properly exercised its authority not to regulate Greenhouse Gas emissions under § 202(a)(1) of the CAA, 42 U.S.C. § 7521(a)(1). *Massachusetts v. Environmental Protection Agency*, 415 F.3d at 56. Nor did the Court address EPA's claim that *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) prohibited EPA from taking on a large government program without specific statutory authority. The Court ruled that under its previous decision in *Ethyl*

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and did not specifically authorize regulation at that time. *Id.* at 52926. EPA likewise contends that enactments like the Energy Policy and Conservation Act – which granted authority to regulate fuel economy standards to the Department of Transportation – made clear that Congress was withholding the ability to regulate Greenhouse Gases under the CAA. *Id.*

Corp. v. Environmental Protection Agency,[3] EPA had leeway to consider-"policy decisions" in deciding whether to regulate Greenhouse Gas emissions and that EPA had properly exercised its judgment in denying the petition. *Massachusetts v. EPA*, 458 F.3d at 58.

Judge Sentelle concurred in the judgment of the Court, citing entirely different reasoning. *Id.* at 59 (Sentelle, J. concurring). He opined that Petitioners failed to establish harm sufficiently particularized to themselves to fulfill Article III standing. *Id.* at 59-60. *Amici* State of Delaware agrees with the arguments made in sister *Amici* States' Brief that Petitioners established harm sufficiently particularized to themselves to establish Article III standing.

In dissent, Judge Tatel disagreed with both Judge Sentelle's assertion that Petitioners failed to show a sufficiently particularized injury, *id.* at 64-65, and Judge Randolph's conclusion that EPA has acted properly in denying the petition. The dissent opined that EPA had regulatory authority under § 202(a)(1) of the CAA and that EPA's refusal to regulate was improper insofar as it was not based on the regulatory framework provided in § 202(a)(1) of the CAA. *Massachusetts*, 415 F.3d at 74-82.

Since the denial of the petition by EPA, California has petitioned EPA for a waiver in order to adopt its own emissions standards for motor vehicles, as it is permitted to do under § 209(b) of the CAA, 42 U.S.C. § 7543(b). The California Air Resources Board, pursuant to § 43018.5 of the California Health & Safety Code, promulgated regulations

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[3] *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1979).

setting limits on the amount of Greenhouse Gas emissions that can be released from motor vehicles sold in California starting with model year 2009.[4]

Ten other states (Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) have so far adopted California's Greenhouse Gas emissions standards pursuant to § 177 of the CAA. 42 U.S.C. § 7507. In December 2004, suit was brought by a group of car manufacturers against the State of California on various grounds including an allegation that EPA's decision that Greenhouse Gas emissions cannot be regulated under § 202(a)(1) of the CAA preempts the California regulation because California cannot adopt standards altogether inconsistent with the CAA.[5] Similar lawsuits have been filed in two other states that adopted California's standards.[6]

SUMMARY OF THE ARGUMENT

The Clean Air Act specifically authorizes EPA to regulate "air pollutants" that endanger public health or "welfare," a term which explicitly includes "climate." Emitted Greenhouse Gases cause global climate change and thereby are included under the substances capable of

[4] *See* 13 Cal. Code of Reg. §§ 1900, 1961, 1961.1 (2005).

[5] *See* First Amended Complaint, *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. Civ.-F-04-6663-AWI-LJO (E.D. Cal.), ¶¶ 9(b), 47-51, 122-23 (2004).

[6] *See* Complaint, *Association of International Automobile Manufacturers v. Sullivan*, No. 06-69T (D.R.I.) (2006); Complaint, *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Torti*, No. 2:05-CV-302 (D. Vt.) (2005).

regulation under the Clean Air Act. EPA misread the plain and unambiguous language of the Clean Air Act when it determined that it lacked authority to regulate Greenhouse Gas emissions from motor vehicles and motor vehicle engines. EPA's erroneous reading is not entitled to the far-reaching deference granted under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, because *Chevron* deference is not appropriate when the meaning of the statute is clear. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Further, in ignoring the language of the statute, EPA did not carry its burden under *Engine Manufacturers Association v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996), to provide an extraordinarily convincing justification that Congress did not intend the plain meaning of the statutory wording. The clear language of § 202(a)(1), coupled with definitions elsewhere in the Act, allow, and in fact require, EPA to regulate Greenhouse Gas emissions from motor vehicles and motor vehicle engines once a finding that Greenhouse Gas emissions may reasonably be anticipated to endanger public health and welfare has been made. *Amici* State of Delaware has an interest in EPA fulfilling its statutory obligation to regulate Greenhouse Gas emissions because, even if Delaware were able to enact its own emission standards (an action currently prohibited under § 177 of the Clean Air Act, 42 U.S.C. § 7507), Delaware would still be greatly impacted by the emissions from out-of-state vehicles traveling within Delaware that are beyond its regulatory reach.

Moreover, EPA acted arbitrarily and capriciously in refusing to regulate Greenhouse Gas emissions from motor vehicles and motor vehicle engines. The CAA requires EPA to utilize the regulatory structure provided under § 202(a)(1) of the Clean Air Act. Instead, EPA chose to rely

upon policy decisions to deny the petition. EPA did not make a finding as to whether Greenhouse Gases "may reasonably be anticipated to endanger the public health or welfare." The only time for EPA to utilize its judgment under § 202(a)(1) of the Clean Air Act is when making a finding as to whether Greenhouse Gas emissions from motor vehicles and motor vehicle engines "may reasonably be anticipated to endanger public health and welfare." As EPA declined to do this, the denial of the petition is arbitrary and capricious. Furthermore, EPA misreads this Court's decisions in *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), and *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976), as permitting a regulatory agency to rely on policy decisions in lieu of following the unambiguous language of statute.

ARGUMENT

I. THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES.

A. The Unambiguous Language Of § 202(a)(1) Of The Clean Air Act Provides That EPA May Regulate Greenhouse Gas Emissions From Motor Vehicles And Motor Vehicle Engines.

EPA misread the clear language of § 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), in determining that it does not have the authority to regulate Greenhouse Gas emissions from motor vehicles and motor vehicle engines. EPA's authority to do so is based on the plain and unambiguous language of § 202(a)(1), which states in pertinent part:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

A court's inquiry into the meaning of a statute begins with the statutory text, and "ends there as well if the text is unambiguous." *BedRoc Ltd., L.L.C. v. United States*, 541 U.S. 176, 183 (2004). The text in the case at bar is unambiguous. Thus, this Court's inquiry into the meaning of § 202(a)(1) is limited to this unambiguous language. A close reading of § 202(a)(1) provides that EPA "*shall* by regulation prescribe . . . standards applicable to the emission of any *air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which *in [EPA's] judgment* cause, or contribute to, air pollution which *may reasonably be anticipated to endanger public health* or *welfare*." 42 U.S.C. § 7521(a)(1) (emphasis added).

Greenhouse Gases are "air pollutants" within the meaning of "air pollutants" covered by this section as chemical substances emitted into ambient air:

> The "air pollutants" subject to regulation under § 202 are defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."

Clean Air Act § 302(g), 42 U.S.C. § 7602(g).

One of the Greenhouse Gases at issue here, CO_2, is specifically included within the definition of air pollutants. Clean Air Act § 103(g), 42 U.S.C. § 7403(g).

Moreover, "welfare" in this context includes consideration of climate because it is defined as follows:

> "all language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants."

Clean Air Act § 302(h), 42 U.S.C. § 7602(h).

Thus, from the text of § 202(a)(1), and the definitions applicable to that section, it is clear that EPA is authorized to regulate Greenhouse Gas emissions, since Greenhouse Gases are substances emitted into the air that endanger climate.[7]

EPA is delegated the responsibility in addition to the authority to regulate Greenhouse Gases to protect climate.

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[7] In addition to direct effects on "climate," climate change endangers "welfare" through many of the other effects enumerated in § 302(h), including effects on "weather" (e.g., increased storm activity and changes in rainfall or drought patterns), "damage to and deterioration of property," and "effects on crops." Further, emissions that cause climate change endanger "public health" in several ways – e.g., by raising air temperature so as to increase the severity of health-damaging smog episodes. Intergovernmental Panel on Climate Change, *Third Assessment Report* (2001), Working Group II Technical Survey, at 43.

Section 202(a)(1) states that EPA "shall" regulate if it finds that a pollutant "may reasonably be anticipated to endanger public health or welfare." EPA's judgment under this section is limited to whether a pollutant meets the so-called "endangerment standard." Once EPA makes such a finding, EPA has a duty to regulate the pollutant.

In fact, EPA is prohibited from considering factors not expressly mentioned in the statutory delegation. *Whitman v. American Trucking Association*, 531 U.S. 457, 467 (2001). This is true because in choosing the language of governing statutes, Congress carefully imposes important substantive and procedural restraints on agency officials' exercise of their lawmaking authority. These restraints supply the "intelligible principle" necessary to avoid non-delegation doctrine concerns, as well as the "law to apply" necessary for judicial review. *Whitman v. American Trucking Ass'n*, 531 U.S. 472-74, citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Thus, the only proper factor EPA can consider under § 202(a)(1) of the CAA is whether the statutory standard has been met. *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987).

B. The Counter-Textual Arguments Offered By EPA Are Unconvincing.

Despite the unambiguous language of the statute, EPA makes several strained counter-textual arguments to support its claim that it does not have authority to regulate Greenhouse Gas emissions under § 202(a)(1) of the Clean Air Act – (1) Congress was not concerned with global warming when drafting the CAA; (2) policy reasons necessitate regulation of global pollutants via separate,

specific statutes; (3) Congress's behavior evidences EPA's lack of authority based on *FDA v. Brown & Williamson*; and (4) an interagency conflict exists with the Department of Transportation's fuel economy standards under the Energy Policy and Conservation Act, 49 U.S.C. §§ 32901-32919. *See Massachusetts*, 415 F.3d at 68 (Tatel, J., dissenting). None of these arguments is convincing.

1. Congress Was Concerned With Climate Change And Did Intend To Regulate Greenhouse Gases When Drafting The Clean Air Act.

Congress has in fact been quite specific in demonstrating that effects on "climate" fall within the scope of the Clean Air Act. However, even if this were not the case, this Court has held consistently that an agency can regulate a new subject matter in the absence of proof of specific Congressional intent directed at the particular problem. *See Diamond v. Chakrabarty*, 447 U.S. 303, 314-15 (1980) (rejecting argument that, because genetic technology was unforeseen when broad patent statute was enacted, microorganisms could not be patented until Congress expressly authorized it). This Court has held that "the fact a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity . . . it demonstrates breadth." *PGA Tour v. Martin*, 532 U.S. 661, 689 (2001).

2. EPA Does Not Need Separate Statutes To Regulate Greenhouse Gases.

Furthermore, each of the statutes cited by EPA as tending to prove that Congress has not manifested an

intent to regulate Greenhouse Gas emissions is actually consistent with EPA having authority to regulate Greenhouse Gases under § 202(a)(1) of the CAA. In fact, these statutes tend to disprove EPA's claim that global pollutants need to be regulated via separate statutes. EPA cites the National Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq.*; the Global Climate Change Research Act of 1990, 15 U.S.C. § 2921 *et seq.*; and Energy Policy Act of 1992, 42 U.S.C. § 13201 *et seq.*, to support this assertion. However, the Global Climate Change Research Act states that "nothing in the Act shall be construed, interpreted or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change." Global Climate Change Research Act of 1990, 15 U.S.C. § 2938(c). Moreover, none of these acts is a regulatory law; rather, each provides for voluntary Greenhouse Gas emissions reductions. There is nothing inherently inconsistent with Congress providing a mechanism for enforcing reductions of an air pollutant while simultaneously seeking to encourage voluntary reductions.

3. EPA Inappropriately Relied On *FDA v. Brown & Williamson* In Determining It Does Not Have Authority To Regulate Greenhouse Gases.

EPA inappropriately relied on *FDA v. Brown & Williamson* for the proposition that the EPA's having authority to regulate air pollutants associated with climate change would contradict other Congressional enactments. *FDA v. Brown & Williamson* is inapposite because a finding that the word "drug" included tobacco would have

forced the FDA to outlaw all tobacco products. In the case of this petition, finding that the term "air pollutant" within CAA § 302(g) includes CO_2 would only require the EPA to regulate CO_2, not to proscribe its emission. *See Massachusetts*, 415 F.3d at 71 (Tatel, J., dissenting).

Under § 202(a)(1) of the CAA, EPA would only have to set technologically and economically feasible standards – something the agency has done for decades with other pollutants emitted from motor vehicles and motor vehicle engines. Section 202 of the CAA includes protections designed to prevent severe economic impacts from occurring. Section 202(a)(2) of the CAA provides that new emissions standards are to "take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Clean Air Act § 202(a)(2), 42 U.S.C. § 7521(a)(2).

Further, *FDA v. Brown & Williamson* concluded that the Food, Drug and Cosmetic Act (FDCA) was unambiguous and that Congress had "directly spoken to the issue here and precluded FDA's jurisdiction to regulate tobacco products." 529 U.S. at 133. Central to the Court's analysis was the fact that the FDA had for 60 years denied that it had authority to regulate tobacco products under the FDCA and that Congress had enacted legislation aimed at regulation of tobacco products. In the case at bar, there is no such parallel Congressional action, nor has EPA consistently denied that it had the ability to regulate Greenhouse Gases.

4. EPA Has In The Past Recognized Its Ability To Regulate Substances Causing Climate Change, Specifically Greenhouse Gases Emitted By Motor Vehicles And Motor Vehicle Engines Under § 202(a)(1) Of The Clean Air Act.

Further undermining EPA's recent contention that it does not have authority to regulate Greenhouse Gases under the CAA is the fact that EPA previously maintained that it had the authority to regulate Greenhouse Gases emitted from motor vehicles and motor vehicle engines. *See* Memorandum from Jonathan Z. Cannon, General Counsel of the EPA, to Carol M. Browner, Administrator of the EPA (Apr. 10, 1998).[8] Months later, Cannon's successor, Gary Guzy, testified before Congress on the impacts of global warming. Gary S. Guzy, General Counsel of the EPA, Testimony Before a Joint Hearing of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the Committee on Government Reform and the Subcommittee on Energy and Environment of the

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[8] On March 11, 1998, Congressman Tom DeLay requested a legal opinion from EPA Administrator Carol Browner on the question of whether the CAA allows the EPA to regulate CO_2 emissions of motor vehicles and motor vehicle engines. In October 1998, Jonathan Cannon, General Counsel for the EPA, prepared the requested legal memorandum, in which he made the threshold determination that CO_2 "is an air pollutant within the meaning of the CAA." *Id.* at 2. Cannon further noted that the EPA's authority to regulate CO_2 is "linked to [a] determination by the Administrator regarding [CO_2's] actual or potential harmful effects on public health, welfare, or environment." *Id.* at 3. In effect, Cannon's stance allowed for the EPA to regulate CO_2 under CAA section 202(a)(1), among other sections, as long as the Administrator concluded that CO_2 "cause[d], or contribute[d] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

Committee on Science, U.S. House of Representatives (Oct. 6, 1999) (*available at* http://www.house.gov/science/guzy_100699.htm) (last visited Aug. 22, 2006). In fact, EPA took the opposite view for what appears to be the first time in a memorandum by EPA General Counsel released the same day EPA denied the petition. *See* Memorandum from Robert E. Fabricant, General Counsel, to Marianne L. Horinko, Acting Administrator, "EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act (August 28, 2003) (*available at* http://www.epa.gov/airlinks/co2petitiongcmemo8-28.pdf) (last visited August 22, 2006).

5. Interagency Conflict With The United States Department Of Transportation Does Not Prohibit EPA From Regulating Greenhouse Gases Emitted From Motor Vehicles And Motor Vehicle Engines.

EPA reasons that it cannot regulate Greenhouse Gases from motor vehicles and motor vehicle engines because the United States Department of Transportation (DOT) was granted the authority to set fuel economy standards under the Energy Policy and Conservation Act, 49 U.S.C. §§ 32901-32919. This contradicts the clear language of the Energy Policy and Conservation Act, which expressly recognizes that motor vehicle standards set by other agencies may affect fuel economy. 42 U.S.C. § 32902(f). The regulatory authority granted to EPA and DOT are not mutually exclusive, and there is, therefore, no Congressional bar overlapping EPA regulation under § 202(a)(1) of the CAA and DOT regulation under the Energy Policy and Conservation Act.

II. EPA'S DECISION NOT TO REGULATE GREENHOUSE GASES WAS ARBITRARY AND CAPRICIOUS.

Not only does EPA have the ability to regulate Greenhouse Gases emitted from motor vehicles and motor vehicle engines, but EPA acted arbitrarily and capriciously, abused its discretion and otherwise acted not in accordance with law in denying the petition requesting EPA to regulate. Administrative Procedure Act § 706, 5 U.S.C. § 706.

Instead of employing the statutory framework, EPA arbitrarily and capriciously substituted its policy concerns for the process established by Congress when it denied the petition. EPA denied the petition on various grounds. One concern was interagency confusion,[9] because it believed that regulating Greenhouse Gases would cut against President George W. Bush's current climate change policy and constitute "piecemeal" regulation of one source of Greenhouse Gas emissions. Also, it believed that a regulatory scheme would not comport with the President's comprehensive approach to climate change that calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development. EPA also noted that it did not want to disrupt the "public-private partnerships formed to develop break-through technologies that could dramatically reduce the economy's reliance on fossil fuels without slowing its growth." Further, EPA worried that foreign countries might allow Greenhouse Gas emissions to increase if the United States reduced its emissions, thereby

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[9] *See* Part I(B)(5) *infra*.

offsetting any global emission decrease. Cen. Hve., 68 Fed. Reg. at 52925-30.

To support its reliance on policy decisions, EPA relies on *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) for the proposition that EPA may consider "the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area." *Massachusetts*, 415 F.3d at 58. However, if EPA can ground decisions not to regulate on policy considerations absent from the text of the CAA, *Ethyl* would effectively allow EPA unfettered discretion in making threshold regulatory determinations. *See* Christopher Giovinazzo, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide*, 30 Harv. Envtl. L. Rev. 99, 148-49 (2006) ("The implication of *Massachusetts v. EPA* is thus that the words 'in his judgment' afford the EPA the discretion to refuse to act on the basis of efficiency, cost, or any other practical concern entirely beyond the narrow endangerment finding"). The *Ethyl* decision does not stand for the proposition that EPA can base rulemaking denials on policy judgments. *See Massachusetts*, 415 F.3d at 76 (Tatel, J., dissenting) ("*Ethyl* makes quite clear that the Administrator's policy-based discretion is limited to the terms of the statute.") Rather, *Ethyl* allows an agency to justify affirmative decisions to regulate on policy decisions, and only if the policy issues taken into account "relate[] to whether the statutory standard ha[s] been met." *Massachusetts*, 415 F.3d at 76 (Tatel, J., dissenting). Applying this *Ethyl* filter to the case at bar reveals that EPA cannot couch its actions in the fabric of *Ethyl* since EPA made a decision not to regulate in this instance.

Congress did not intend EPA to consider such extraneous factors as how regulation of Greenhouse Gases from

mobile sources "interfaces with fuel economy standards," 68 Fed. Reg. at 52929, or differs from the President's climate change policy, *id.* at 52930, in making a judgment as to whether a substance causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare. The sole question authorized by Congress in making this determination is whether a substance causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare.

In fact, only one of EPA's policy considerations, that of scientific uncertainty, speaks to the regulatory structure provided under § 202(a)(1) of the CAA. None of the other factors addresses in any way whether the effects of Greenhouse Gas emissions "may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7521(a)(1).

EPA's reliance on scientific uncertainty in denying the petition is improper. The levels of uncertainty present in the National Academy of Science Report, National Academy of Sciences, Natural Resources Council, *Climate Change Science: An Analysis of Some Key Questions* (2001) [hereinafter *NAS-NRC Report*] are not great enough to cast doubt on the fact that Greenhouse Gas emissions are causing global climate change. The NAS-NRC Report merely recognizes that the scope of climate change is uncertain – it does not challenge the existence of climate change.

A. Scientific Uncertainty Is Not Great Enough To Prevent An Endangerment Finding.

There is not enough uncertainty in the *NAS-NRC Report* and in global climate change science in general to justify EPA's decision to deny the petition in this case. There is adequate evidence in the record, in the form of

reports demonstrating the current state of the science behind global climate change, that the coastal United States, including Petitioners Massachusetts, Rhode Island, Connecticut, New York, and New Jersey as well as *amici* Delaware, will be subject to harm from the effects of global climate change, at least some of which is directly related to Greenhouse Gas emissions of motor vehicles and motor vehicle engines. NAS-NRC Report; Intergovernmental Panel on Climate Change (IPCC), Working Group I Report, *Climate Change 2001: The Scientific Basis* (2001) (*available at* http://www.grida.no/climate/ipcc_tar/wg1/index.htm) (last visited August 29, 2006)[hereinafter *IPCC Report*]. Even ignoring the more dire consequences included in the future climate models suggested by the *IPCC Report*, the *NAS-NRC Report* includes ample evidence of endangerment. There is a 90 percent probability that by 2100, the Earth will warm between 1.7 and 4.9° C, resulting in more frequent heat waves, droughts, and extreme precipitation events. Hassol, Susan Joy, Arctic Council, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* 5 (2004) [hereinafter *ACIA*].

According to the *NAS-NRC Report* there was a global mean surface air temperature rise of between about 0.7 and 1.5° F during the twentieth century. *NAS-NRC Report* at 3. Such warming is "spatially widespread" and "consistent with the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of ice on rivers and lakes, the accelerated rate of rise of sea level during the 20th century relative to the past few thousand years, and the increase in upper-air water vapor and rainfall rates over most regions." *NAS-NRC Report* at 16. The report acknowledges that atmospheric concentrations

of CO_2 are increasing as a result of human activity (*NAS-NRC Report* at 2) and adopts the IPCC conclusion that "most of the observed warming of the last 50 years is likely to have been due to the increase in Greenhouse Gas concentrations accurately reflects the current thinking of the scientific community on the issue." The *NAS-NRC Report* relied upon by EPA shows that, since approximately 7 percent of the Greenhouse Gases released in the United States are released by means of exhaust from motor vehicles, Greenhouse Gas emissions of motor vehicles and motor vehicle engines are, at least in part, directly responsible for global climate change and accompanying harm to Petitioner States. The Petitioner States have been, over the past century, harmed by EPA's failure to regulate Greenhouse Gas emissions from motor vehicles. More importantly, the *NAS-NRC Report* indicates that "even in the more conservative scenarios, the models project temperatures and sea-levels that continue to increase well beyond the end of this century, suggesting that assessments that examine only the next 100 years underestimate the magnitude of the eventual impacts." *NAS-NRC Report* at 5.

Petitioner States Massachusetts, Rhode Island, New York, New Jersey, and Washington are particularly susceptible to the effects of global climate change since, like Delaware, they are located in a middle latitude region, and since "middle and high latitude regions appear to be more sensitive to climate change than other regions, significant impacts in these regions are likely to occur at lower levels of global warming." *NAS-NRC Report* at 21. Petitioner States offered evidence in the form of engineering expert

testimony declaring that estimated future rises in sea levels could engulf coastal land and cause augmented storm surge flooding.

Although the *NAS-NRC Report* declines to state whether there is a "safe" level of Greenhouse Gas emissions because such determination depends both on viewpoint and value judgment (*NAS-NRC Report* at 20) the *Report* concludes that "greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise," (*NAS-NRC Report* at 1) and states that "despite the uncertainties, there is general agreement that the observed warming is real and particularly strong within the past twenty years." *NAS-NRC Report* at 3. Relied on by the EPA, the *Report* concludes that:

> Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface temperatures and subsurface ocean temperatures to rise. . . . The changes observed over the past several decades are likely mostly due to human activities, but we cannot rule out that some significant part of these changes are also a reflection of natural variability. Human-induced warming and associated sea-level rises are expected to continue through the 21st century. Secondary effects are suggested by computer model simulations and basic physical reasoning. These include increases in rainfall rates and increased susceptibility of semi-arid regions to drought. The impacts of these changes will be critically dependant [*sic*] on the magnitude of the warming and the rate with which it occurs.

NAS-NRC Report at 1. This conclusion in itself is enough to maintain that EPA made a clear error of judgment in denying the petition. Even from the emphasized level of uncertainty in the *NAS-NRC Report*, it is obvious that there are severe actual and imminent dangers attributed to global climate change. Had EPA not sidestepped the question set out in the statute, it could not have denied that Greenhouse Gas emissions "cause or contribute to" global climate change, which in turn "may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7521(a)(1). EPA has a duty to regulate such emissions.

B. Scientific Uncertainty Is Not A Factor EPA May Use In Making An Endangerment Finding.

The United Nations Framework Convention on Climate Change prohibits EPA from using scientific uncertainty as the basis to deny extending CAA regulation to Greenhouse Gas emissions. United Nations Framework Convention on Climate Change, Art. 3, 4; May 29, 1992, U.N. Doc. A:AC.237/18 (1992), reprinted in 31 I.L.M. 849 (1992).

The Convention states that the signatory nations:

> should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, *lack of full scientific certainty should not be used as a reason for postponing such measures*, taking into account that policies and measures to deal with climate change should be cost-effective

> so as to ensure global benefits at the lowest possible cost.

United Nations Framework Convention on Climate Change, Art. 3 ¶ 3 (emphasis added).

Furthermore, the developed nations "shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." *Id.* Art. 4 ¶ 4(a).

Ratified treaties, along with the Constitution itself and United States Laws, are the "supreme Law of the Land." U.S. Const. art. VI. Thus an "act of Congress ought never be construed to violate the law of nations if any other possible construction remains . . . " *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting).

Considering the effect of the United Nations Convention on Climate Change in light of the aforementioned cases, it is clear that EPA is prohibited from using "scientific uncertainty" as a reason to deny the petition in this case.

III. DELAWARE HAS A PARTICULAR INTEREST IN THE PROMPT FEDERAL REGULATION OF GREENHOUSE GASES.

Amici State of Delaware has a particular interest in EPA regulating Greenhouse Gas emissions. In the present action, Delaware has a heightened interest in the effects of

global climate change because it is (1) a middle latitude, low-lying coastal state, and (2) a state that is incapable of regulating Greenhouse Gas emissions from motor vehicles and motor vehicle engines on its own.

Delaware is located between 38 degrees, 27 'N and 39 degrees, 50 'N latitude. Delaware is a small state bordered by the Atlantic Ocean, Delaware Bay, and the States of Maryland, New Jersey, and the Commonwealth of Pennsylvania. Most of the State is in the low-lying Atlantic Coastal Plain. Its highest point is approximately 448 feet above sea level, with its lowest elevation at sea level on its Atlantic Coast. State of Delaware, Delaware Geography (2006) (*available at* http://www.state.de.us/gic/delfacts/geo.shtml# elevation) (last visited August 29, 2006.) Climate scientists warn that the melting of the polar ice sheets could have dire consequences for coastal areas. Jonathan M. Gregory *et al.*, *Threatened Loss of the Greenland Ice Sheet*, 428 Nature 616 (2004). If the current pace of melting continues, the seas will rise 10 or more meters, flooding areas inhabited by 25 percent of the population of the United States. U.S. Geological Survey, *Sea Level and Climate* (2000) (*available at* http://pubs. usgs.gov/fs/fs2-00/) (last visited August 29, 2006.) The Gulf and East Coast states, including Delaware, will experience the brunt of the impacts of global climate change. *Id.* The average elevation of Delaware is a mere 60 feet, or 18 meters, above sea level, The Columbia Encyclopedia, 6th Ed. (2006) *Delaware* (*available at* http://www.encyclopedia.com/html/D/Delawar-st.asp) (last visited August 28, 2006) and a rise in sea levels of 10 meters would be devastating for Delaware. Therefore, it is vitally important to regulate Greenhouse Gases to slow and eventually stop the effects of global warming caused by the atmospheric buildup of such chemical substances.

Delaware is incapable of fully regulating Greenhouse Gas emissions from motor vehicles and motor vehicle engines. According to Delaware Department of Transportation, Division of Planning Databases, Surveys and Records Acquired for and used to support a Travel Demand Model, fully 9.1 percent of all vehicle miles traveled within the State are estimated to be those of out-of-state vehicles (those drivers having one or both of the beginning and end of a trip destination out of state). Michael DuRoss, Planning Supervisor, Delaware Department of Transportation, Division of Planning, *24 Hour Daily or Average Annual Daily Traffic* (*AADT Report*) (August 22, 2006). Moreover, according to the Delaware State Police, 24 percent of vehicles involved in traffic accidents were registered with non-Delaware tags in the year 2005. Delaware State Police TraCS System (2005) (last visited August 26, 2006). Also, 33 percent of traffic arrests within the State of Delaware involved individuals with an out-of-state drivers license. Delaware Judicial Information System, DELJIS Database (2005) (last visited August 26, 2006). These numbers indicate that a very large percentage of automobiles emitting Greenhouse Gases within Delaware are not within Delaware's jurisdictional reach and therefore cannot be regulated by the State. The only way to effectively regulate all of the vehicles traveling in Delaware would be through EPA regulation.

CONCLUSION

For the aforementioned reasons and upon the authorities cited above, the State of Delaware requests an order declaring that EPA has the authority and statutory obligation to regulate Greenhouse Gases emitted by motor

vehicles and motor vehicle engines under § 202(a)(1) of the Clean Air Act.

Respectfully Submitted,

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